Tomatek, Inc. and Graphic Communications Union District Council No. 2, Local 388M AFL-CIO.

Cases 32-CA-16779 and 32-CA-16876

May 8, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On July 20, 1999, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a brief in answer to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, ¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Michelle M. Smith and Olivia Boullt, Esqs., for the General Counsel.

Fred Long, Esq., of Los Gatos, California, and W. Chris Thomas (American Consulting Group, Inc.), of Costa Mesa, California, for the Respondent.

Jim Reza, Special Representative, of Fullerton, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. This is an unfair labor practice prosecution against Tomatek, Inc. (the Respondent), a State of Washington corporation which owns and operates a tomato processing and bulk-packaging plant in Firebaugh, Fresno County, California, in the Central Valley.¹

The case is rooted in events that took place in and around the Firebaugh plant during the first 6 months of 1998.² During this period, Graphic Communications Union, District Council No. 2, Local 388M, AFL–CIO (the Union) was engaged in the prepetition phase of an organizing campaign among the Respondent's production and maintenance employees, most of whom were then in seasonal layoff status. The campaign was ultimately successful; the Union won a Board-conducted election held on September 29, and was soon certified as the exclusive collective-bargaining representative of those employees.

The prosecution is brought in the name of the General Counsel of the National Labor Relations Board by the Regional Director for Region 32, who issued a consolidated complaint on September 25, after investigating charges and amended charges filed by the Union between May 21 and September 23.3 The complaint alleges violations of Section 8(a)(3) and (1) of the National Labor Relations Act. The 8(a)(3) counts allege, in substance, that the Respondent discriminated against two of its employees, Jose Lopez and David Rivera, when it admittedly issued certain disciplinary warnings to them and eventually discharged them (Lopez on May 18, Rivera on June 5), all allegedly because of their activities on the Union's behalf. The independent 8(a)(1) counts allege, in substance, that, before Lopez and Rivera were fired, the Respondent, through named agents, "interrogated" them repeatedly about their own and others' union activities, and-for "retaliatory" reasonsimposed greater scrutiny" on their "work and/or work habits," and "impliedly threatened" Lopez minutes before he was fired.

The Respondent denies all alleged wrongdoing, and avers that the disciplining and discharging of the two employees were grounded exclusively in their recent and repeated acts of misconduct. Moreover, the Respondent's main actors commonly insist that they did not learn that the Union was conducting an organizing campaign, or that Lopez and Rivera were involved with it, until May 26, when a mailed copy of the Union's initial charge in this case, filed in the aftermath of Lopez' dismissal on May 18, was delivered to the Firebaugh plant.

I heard the trial of the case in Fresno and Clovis, California, on February 9–11, 1999. I have studied the entire record, including the posttrial briefs submitted by counsel for the General Counsel and the Respondent. Based on pivotal credibility assessments and other considerations amplified below, I will find no merit to any of the counts in the complaint.

I. PRINCIPAL FINDINGS; AREAS OF DISPUTE⁴

A. Operations and Hierarchy at the Firebaugh Plant

The Firebaugh plant is equipped to receive, process, bulk-pack, and ship fresh-harvested tomatoes from California's Cen-

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's decision dismissing the complaint, we note that while it is undisputed that the Charging Party Union had been involved in an organizing effort among the Respondent's employees since late February 1998, and that alleged discriminatees Jose Lopez and David Rivera were active in it, there is no credited record evidence that the Respondent was aware of either the organizational effort or of Lopez and Rivera's involvement in protected activities until May 26, 1998, when it received notice of unfair labor practice charges alleging that Lopez' discharge and Rivera's discipline were unlawful.

Based on the amended pleadings, I find that during the year before the complaint issued, the Respondent sold and shipped more than

^{\$50,000} worth of goods directly to customers outside California, and, therefore, that the Respondent satisfies both the Board's statutory and discretionary requirements for asserting jurisdiction.

² All dates below are in 1998 unless I specify otherwise.

³ The charge in Case 32–CA–16779 was filed on May 21, 1998; the charge in Case 32–CA–16876 was filed on July 14, and was amended on September 23, 1998.

⁴ Except where noted, the findings in this section are based on testimony or other evidence of record that no party or witness has called into question.

tral Valley. It is fully operational only during the 3-month tomato harvest season, which typically runs from about July 1 to about October 1. During the season, the plant operates aroundthe-clock, on three shifts, using 500–600 production and maintenance employees and 20–30 production supervisors. During the 9-month balance of the year, the plant is basically idle from a production standpoint, and the working complement shrinks drastically, usually numbering no more than 80 workers and as few as 40, all depending on particular needs at any given point. Most of the work done during the off-season involves maintenance and repair of the production equipment, to ready the plant for another processing season. Most of the people who do this get-ready work, such as alleged discriminatees Lopez and Rivera, are recalled from the ranks of mechanics and mechanicassistants who worked in the preceding season.

Robert Waid is the plant manager. He had been installed in that position in October 1997, after having worked previously as a plant manager for a different employer, Campbell Soup. Waid testified that he was charged in his new position with the responsibility for "turn[ing] the company around . . . to make a new improved Tomatek." Waid reported to Steve Arnoldy, the Respondent's corporate-level director of operations, who supervised operations conducted not only at Firebaugh, but at a plant in San Benito, California, where employees were represented by a union whose identity is not of record. Arnoldy maintained his own offices at the Respondent's headquarters in Hollister, a town located about 100 miles to the west of the Firebaugh plant. Waid's immediate subordinate was Assistant Plant Manager Ron Melkonian, who, in the off-season months. was responsible for maintenance and special projects. Maintenance Supervisor John Vasquez was Melkonian's subordinate; at material times, he was the direct supervisor of Lopez and Rivera, and of other maintenance workers who had been recalled in early 1998 to perform get-ready work.

Many of the rank-and-file employees at the plant speak both Spanish and English, but Spanish is the dominant language on the plant floor, and most of the transactions described below—and all those in which Lopez or Rivera were participant—were conducted in Spanish.⁵

B. The Union's Organizing Drive; the Alleged Discriminatees' Involvement

In late February, the Union began an organizing campaign among the Firebaugh plant's employees. Its first goal was to secure enough signed authorization cards from these workers to permit it to file a petition for representation election, which it did some 6 months later, on August 11 (in Case 32–RC–4499) ⁶

leading to its September 29 election victory and its certification. When the campaign began in late February, most of the 500-plus employees who would eventually vote in the election were still in layoff status and awaiting recall in the next season, but many still resided in or around Firebaugh and could be contacted at their homes.

Jose Lopez and David Rivera first began working at the plant more than 8 years before they were discharged. Their employment during the intervening years followed the seasonal patterns described above. At times that concern us, Lopez was classified as a mechanic and Rivera as a mechanic-assistant. They were laid off at the end of the 1997 season in October, and were recalled in early 1998 (Rivera on January 2, Lopez on January 28), as were other workers in maintenance classifications. During the cold months lasting through March, Lopez and Rivera worked inside the plant on maintenance tasks. In April, they were assigned to work together on a common outside project, in the "pit" area, which occupied them until they were discharged. They were both among the relatively small group of maintenance employees who had participated in the Union's organizing drive since its inception, on February 21, when the Union's representative, Frank Reza, first met with an initial cadre of four supporters and began to plan the campaign.

C. Disciplinary Warnings and Discharges

1. Warnings to Lopez prior to May 18

Plant Manager Waid was personally and directly involved in the discharges of both Lopez and Rivera, and in many of the events that led up to these actions. Waid had issued a written disciplinary warning to Lopez on May 1, for being "out of his work area talking to another employee-wasting time." Waid had also noted on the warning (which Lopez refused to sign) that "[t]his has happened on more than one occasion[,]" and that "any further violation of company rules could lead to disciplanary [sic] action up to and including termination." Waid testified that the underlying incident had occurred on April 30, when Waid had seen Lopez talking to employee Arcelia Posas at her work station within the processing plant, and had scolded Lopez and sent him back to his own (outside) worksite. Lopez does not dispute that the incident occurred, but testified that he was in the area only because he had just returned from the plant bathroom, and had merely paused to exchange brief greetings with Posas when Waid appeared.

Waid, explaining his notation on the warning that "this has happened more than once," testified, in substance, as follows: The first such prior incident occurred on March 6, when Waid received a phone call in his office from employee Randy Preciado, who complained that Lopez was interfering with his work and creating a safety hazard as Preciado was unloading equipment from a truck in an outside area called the boneyard. Waid left his office and found Lopez still in the boneyard (his

ees in a seasonal industry, it is the Board's policy to conduct the election at or near the peak of the season, when the largest number of unit employees will be on the job and thus easily able to vote in an onsite election. See, e.g., *Baumer Foods, Inc.*, 190 NLRB 690 (1967); *Industrial Forestry Assn.*, 222 NLRB 295 (1976); and *Case-Swayne Co.*, 209 NLRB 1069, 1070 (1974).

⁵ Lopez and Rivera speak comfortably only in Spanish, and delivered all of their testimony in Spanish, through an interpreter. Waid and Vasquez are English-Spanish bilingual, as are most of the other supervisors and managers incidentally referred to below. (Melkonian is an exception.)

⁶ It is uncertain whether the Union's goal in the prepetition phase was simply to get enough cards to satisfy the Board's minimum administrative requirement—a "30 percent showing-of-interest"—for processing a petition for an election, or whether it had more ambitious aims for its pre-petition drive. In any case, I take notice that when a union seeks certification as the representative of a plantwide unit of employ-

assigned work area then was inside the plant, on the dicer line) and asked Lopez what was going on. Lopez replied, "nothing," and walked away, into the plant. Waid then asked Preciado what had happened, and Preciado stated that Lopez had been getting in the way of the unloading and trying to tell Preciado how to do his job. Waid testified that he soon instructed Maintenance Foreman Vasquez to find out why Lopez had been out of his work area. However, there is no evidence that Vasquez ever followed up. The second prior incident, according to Waid, occurred on April 29, when Waid saw Lopez inside the processing plant, talking to employee Robert Cormona. (Lopez' work area by this point was outside the processing plant, in the "pit" area.) Waid states that he walked up to Lopez and Cormona and asked Lopez what was going on. Lopez said he was "borrowing a tool." Waid rejoined, incredulously, "A tool, here?" Lopez quickly replied, "there's no problem, I'm leaving[,]" and then walked away.

Lopez claimed not to "recall" either prior incident. Were it important to the outcome, I would credit Waid, who impressed me as a careful and candid witness with a good memory for details and context, over Lopez, whose testimony overall lacked these qualities, and struck me, moreover, as largely shaped for self-serving purposes. However, I don't think it matters to the outcome, for I will find, as further discussed below, that the General Counsel has failed to establish that Waid or any other company actor was aware of Lopez' or Rivera's union activities during the period in question. In any case, neither of the pre-April 30 incidents described by Waid had resulted in the issuance of a written disciplinary warning to Lopez.

On or about either May 6 or 12, Assistant Plant Manager Melkonian remonstrated with Lopez for smoking in the bathroom of the processing plant. (Lopez, acknowledging that smoking in the bathroom or in any other area within the plant was against well-publicized company rules, testified, nevertheless, that he was not guilty of the offense that had occasioned Melkonian's warning. Melkonian told Waid about the incident within a day after it occurred, and agreed to prepare a memorandum of the incident for insertion into Lopez' personnel file. In fact, Melkonian did not write such a memo until May 28, 10 days after Lopez had been discharged. His explanation for the delay is that it slipped his mind until Waid later reminded him—after Lopez' dismissal—that he needed to bring the paperwork pertaining to Lopez up to date.

2. May 18 incidents; discharge of Lopez; discipline of Rivera

Waid testified that he reached a decision to discharge Lopez on May 18, after observing him involved with Rivera in two more incidents of perceived "goofing off" that day, as follows: In the first incident, occurring around midmorning, Waid used a telephone located on the plant floor to answer a call from a former colleague at Campbell Soup. While on the phone, he observed Lopez and Rivera engaging in jocular conversation and doing no work, a pattern that continued for upwards of another 25 minutes. After Waid got off the phone, he walked over to the duo, angrily asked what was going on and why they weren't working, received answers that he rejected as "nonsense," and then scolded them for "wasting time." (Lopez' and Rivera's versions of the same incident were perfunctory and vague, but not inharmonious with Waid's own, more detailed and quite credible account.)

At about 1:50 p.m. on the same day, says Waid, he was on an elevated perch inspecting evaporators when he observed Lopez and Rivera standing idly and talking near the conveyor that they were supposed to be working on. This continued for about 2 minutes, following which the two walked away together, past the maintenance shop, after which Waid lost sight of them. At this point, according to Waid, minutes still remained before the start of the afternoon break at 2 p.m., which is marked by the sounding of a horn. (Lopez and Rivera told a variant version, in which they claim that Lopez left first, went to the maintenance shop to sharpen a drill bit, and was soon joined by Rivera, who had just dulled his second, and only remaining drill bit. However, the break horn sounded at about this point, following which the two went outside to a designated smoking area.) Waid states that he did not see the two workers again until they returned to the conveyor area, some minutes after the second horn sounded marking the end of the break. Then, says Waid, he watched with growing irritation as the two continued to converse for another 2 minutes without doing any work. Waid then left his perch and went to his office and called Vasquez. who reported that he had observed Lopez and Rivera overstaving their break and had told them to get back to work. Regarding this, Vasquez independently testified that, about 3 minutes after the end-of-break horn had sounded, he had found Lopez and Rivera near the smoking area, still engaged in conversation with several other mechanics who (unlike Lopez and Rivera) were assigned to work in that general area. Vasquez states he told Lopez and Rivera that they should get back to their own work area, and that they initially balked, causing Vasquez to repeat his instruction. Then they complied, but only after Lopez had accused Vasquez (in Spanish, as in all other surrounding transactions) of "fucking with [or "screwing with"] me."

Lopez and Rivera acknowledged that Vasquez had confronted them at or shortly after the point when the end-of-break horn sounded, while they were still talking to a group of fellow mechanics near the break area. Moreover, although Vasquez denies it, Lopez and Rivera testified, in substance, that during this latter confrontation Vasquez made remarks to the effect that they "would need a good lawyer," and that they were "being watched," or that the "boss was watching" them. However, Jose Luis Rosales, one of the other mechanics in the area at the time, recalled this differently when called as the General Counsel's witness. He testified that Vasquez told Lopez and Rivera that they should "leave" because Waid was "waiting for them" in their "work area." Were it important, I would find, consistent with both Vasquez' and Rosales' accounts, that Vasquez never said anything to Lopez and/or Rivera about needing a lawyer, or that they were being watched. Again, however, I see no need to resolve the disputes and discrepancies. The alleged remarks

⁷ I don't find it necessary to decide whether Lopez' claim of innocence was truthful. In any case, I would find, relying on the harmonious accounts of Melkonian and lead mechanic Bobby Contreras, that these company agents had good reason to believe, and did, in fact believe, that Lopez was guilty—indeed, that Lopez had admitted to the offense when first confronted by Melkonian.

of Vasquez, even if made as described by Rivera or Lopez, would not necessarily, nor even probably, imply that any "watching" was being done in "retaliation" for Lopez' and Rivera's union activities, which, so far as the credible record otherwise shows, were yet unknown to Vasquez, Waid, or any other company agents.

There is no dispute that, soon after the two workers returned from their afternoon break, Waid first summoned Lopez to his office and told him he was being discharged. After this was done, Waid called Rivera to his office, told him he had just fired Lopez, and criticized Rivera for his own role with Lopez in the alleged offenses that day. Noting Rivera's "clean record" to date, however, Waid said that he had decided in his case to issue a written disciplinary warning. The written warning to Rivera stated that "termination" would be the "next disciplinary step proposed." Waid also told Rivera that he would be in a "probationary" status for the next 6 months. No one said anything about union activities during either of the May 18 disciplinary sessions.

3. Admitted company knowledge of union activities on May 26

Waid, Vasquez, and other company agents involved in the various transaction described above and below, commonly testified that they were entirely unaware that the Union had begun an organizing campaign, much less that Lopez or Rivera were involved, until after the just-described events of May 18. (As I discuss in the next section, the only direct evidence indicating that any of these actors had earlier knowledge of union activities is to be found in Lopez' and Rivera's disputed testimony that Vasquez repeatedly questioned them about these things prior to May 18.) Specifically, the company actors harmoniously stated that it was not until Tuesday, May 26, that they learned of the Union's campaign, and of Lopez' and Rivera's involvement, when a mailed copy of the Union's initial charge (naming both employees as the victims of 8(a)(3) discrimination⁸) arrived at the Firebaugh plant and was quickly circulated through the ranks of management. Setting aside the question whether the arrival of the Union's charge marked the first instance of management knowledge, I regard it as highly probable, and I therefore find, that the charge did not reach the Firebaugh plant until May 26.¹⁰

4. Events on June 3, 4, and 5; the discharge of Rivera

On June 3 (see next footnote), Rivera took a lunch break in his car in the plant parking lot. At or soon after the point when the plant horn sounded signaling the end of the break, Rivera emerged from his car and urinated near the edge of the parking lot before returning to his work area. Roman Pardo, a production supervisor, saw this as Pardo was himself exiting the lot in his own car. 11 (Rivera states he took pains to be discreet, by "shielding" himself from general view behind a workmate's van. Pardo claims that Rivera urinated in plain view, unshielded by anything.) Pardo confronted Rivera about the incident later on June 3. Rivera explained that his need to urinate had been urgent, and had amounted to an "emergency." Pardo also mentioned the incident to Vasquez, who separately queried Rivera, and received from him essentially the same, "emergency" excuse. As Rivera acknowledges, Vasquez remonstrated that "[this is] a food plant; that can't be done."

At the start of work the next morning, June 4, Pardo reported the incident to Waid. Waid then conferred with Josefa Price. who recently had been hired as the human resources manager for the Firebaugh plant. Price and Waid agreed that Rivera's conduct had been "disgusting" and could alone warrant his dismissal, as a violation of plant sanitation rules. (Waid, noting the general importance of maintaining sanitary conditions at the food-processing plant, placed special emphasis on the potential injury to the plant's reputation for sanitation if a visiting customer or other outsider were to witness an employee urinating anywhere on the plant premises, except in a bathroom.) Price counseled, however, that they should first question Rivera to determine whether he suffered from any medical condition that might have prevented him from simply walking to the nearest available bathroom to relieve himself. (The nearest bathroom was in the administration building, less than 100 yards away, which also housed the shipping and receiving office; the next nearest was on the floor of the processing plant, no more than 200 yards away.) Waid then called Rivera to his office where, in Price's presence, Waid confronted him over the incident, asking why he hadn't used one of the bathrooms. Rivera again described his need to urinate in terms of an "emergency." Price asked if Rivera had any pertinent medical disability; Rivera said he didn't. Waid asked if Rivera had ever seen anyone else urinate in the parking lot, and Rivera replied that he hadn't.¹² Waid emphasized again that urinating openly in or around the food plant was prohibited. Waid then told Rivera he was being

⁸ The initial charge stated, "Within the past six months the employer has disciplined David Rivera and disciplined and discharged Jose Lopez in retaliation for their union activity."

⁹ Waid testified, after consulting his activity log, that he first saw a copy of the charge on May 26, shortly after it had been received at the plant in a mailing addressed to Vasquez, who had opened it and then brought it to Waid's attention. Vasquez corroborates this account.

¹⁰ The formal papers show that this charge was filed on (Thursday) May 21, then served by mail from the Regional Office in Oakland on (Friday) May 22. The charge form shows that the Union had named Maintenance Supervisor Vasquez as the company representative to contact, and had written in the address of the Firebaugh plant as the Employer's mailing address.

I take notice that this mailing probably would not have been delivered to the Firebaugh plant (some 170 miles from Oakland) as early as the next day, Saturday, May 23, and definitely would not have been delivered on Sunday, May 24, nor on Monday, May 25, which was the designated date for observing Memorial Day. Thus, consistent with

Waid's testimony, it is independently probable that the mailed charge would not have reached the Firebaugh plant until Tuesday, May 26.

¹¹ Rivera uniquely recalled that the urinating incident, and the disciplinary suspension he received from Waid (infra), both occurred on the same day, i.e., June 4. I rely on Pardo, who states that he saw Rivera urinating on June 3, but didn't report the incident to Waid until the morning of June 4, as further described below. In addition, I note that the June 4-dated disciplinary suspension notice that Rivera admits he was shown by Waid on June 4 refers to Rivera's having "urinated in the front parking lot yesterday @12:30pm."

¹² On the witness stand, explaining his admitted response to Waid's query, Rivera asserted that he had, in fact, seen one or more truck drivers urinate on the ground on one or more prior occasions, but did not so advise Waid because he didn't want to get anyone else in trouble.

suspended pending a final judgment as to whether Rivera should be dismissed, and directed Rivera to return to the plant the next day at 1 p.m., to learn his fate. Waid also showed Rivera an already-completed disciplinary suspension form, which Rivera refused to sign. ¹³

Later on June 4, Waid called Chris Thomas, an attorney employed by the Respondent's labor relations counseling firm, American Consulting Group, Inc. Waid was admittedly aware by then through the Union's initial charge, received on May 26, that Rivera was somehow involved in activities on behalf of the Union. He had already consulted with Thomas after receiving that charge, and he called him again on June 4 to get advice about whether he could lawfully terminate Rivera in the light of the most recent incident. Thomas counseled that Waid could, indeed, lawfully terminate Rivera. Waid then called corporate headquarters and made arrangements for them to prepare and transmit a final paycheck for Rivera in time for his followup meeting on June 5.

On June 5, Rivera reported to Waid at 1 p.m., accompanied by several other mechanics who stated that they wished to be present to witness the meeting. Waid told the others that they could not participate but that he would meet later on a one-on-one basis with any of them who wanted to voice any complaints or concerns. The others left, and Waid then ushered Rivera into an office where they were joined by Price. Waid told Rivera that he had decided to discharge him, and handed him his final paycheck. Rivera vowed to continue to work to bring the Union into the plant, and asserted that the Union was backed by "400" employees. Waid stated that Rivera was free to do what he wanted and that the Union had nothing to do with the decision to fire him.

II. PRINCIPAL ANALYSES AND CONCLUSIONS

The consolidated complaint deserves a more specific review: It alleges that the Respondent disciplined and discharged Lopez and Rivera because they had "joined or assisted the Union or engaged in other protected concerted activities." The complaint further charges that Vasquez committed independent violations of Section 8(a)(1) when, "[o]n numerous occasions during March through June 1998, [he] interrogated employees [referring to Lopez and Rivera] concerning their and other employees' union activities." In addition, the complaint charges that Vasquez violated Section 8(a)(1) when, "[o]n or about May 18, 1988, [he] told an employee [Lopez] that Respondent was 'watching him' and impliedly threatened [Lopez] with termination or other unspecified retaliation by telling him that he

would 'need a good attorney,' in retaliation for said employee's union activities." Finally, the complaint alleges that the Respondent violated Section 8(a)(1) when, "beginning in March 1998 and continuing through May 1998," Vasquez "and/or" Plant Manager Waid "imposed greater scrutiny of employees' [Lopez' and Rivera's] work and/or work habits, in retaliation for their union activities."

The merits of the 8(a)(3) counts "turn on employer motivation," and for that reason will require an analysis according to the teachings of *Wright Line*. ¹⁵ The same is necessarily true of the 8(a)(1) counts alleging that "retaliation" for their union activities figured motivationally in Vasquez' "and/or" Waid's alleged "greater scrutiny" of Lopez and Rivera before their discharges, and in Vasquez' alleged "implied threat" to Lopez on May 18. Indeed, the only count in the complaint that does not "turn" on the Respondent's motivations for taking the challenged actions is the one alleging that, "[o]n numerous occasions during March through June," Vasquez "interrogated [Lopez and Rivera] concerning their and other employees' union activities."

The General Counsel's threshold burden under *Wright Line* was to make a "prima facie showing sufficient to support the inference" that the various complained-of actions taken by the Respondent against Lopez and Rivera were "motivated," at least in part, by their activities on behalf of the Union. Moreover, despite the potential confusion introduced by the expression prima facie *showing*, the Board has always recognized that the General Counsel's burden is actually an ultimate burden of "persuasion" on the motivating-factor element, ¹⁶ requiring that the prosecution establish this element by a "preponderance" of the credible evidence in the record as a whole. ¹⁷

[W]e shall henceforth employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

And see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), affirming *Wright Line*'s analytical scheme.

¹⁶ See *Manno Electric*, 321 NLRB 278, 280 fn.12 (1996), discussing the District of Columbia Circuit's opinion in *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1339–1340 (1995), and the Supreme Court's decision in *Office of Workers' Compensation v. Greenwich Collieries*, 512 U.S. 267 (1994). See also *Schaeff Inc. v. NLRB*, 113 F.3d 264, 267 fn. 5 (D.C. Cir. 1997), suggesting that the practical effect of *Greenwich Collieries*, supra, may be no more than the abandonment of the expression "prima facie case" to describe the General Counsel's burden under *Wright Line*.

¹⁷ The Board made it clear in *Wright Line* itself that the General Counsel's burden is actually one that remains with the prosecution throughout the trial, and does not shift. 251 NLRB at 1088 fn. 11. The Supreme Court likewise so held in approving *Wright Line*'s analytical scheme in *Transportation Management*, observing in the process that the General Counsel's burden requires proof of the "motivating-factor"

¹³ In a narrative description on the form of the "reason" for the notice, Waid had cited Rivera's urinating in the parking lot as "clearly a violation of house rule #11—immoral conduct or indecency."

¹⁴ There is no evidence that Lopez or Rivera "engaged in any 'protected concerted activities' at any times material to this case beyond their having "joined and assisted the Union." Moreover, the other counts in the complaint alleging "retaliation" against Lopez and Rivera identify only their "union activities" as the spur for the alleged retaliation. Accordingly, the alternative reference in the quoted paragraph of the complaint to "other protected concerted activities" supposedly engaged in by Lopez or Rivera appears to be an empty and merely ritualistic exercise in pleading.

¹⁵ Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). There, the Board stated centrally (251 NLRB at 1089):

What does it take to satisfy the General Counsel's threshold burden in a Wright Line case? The Board did not purport to answer this question categorically in Wright Line, but a general answer is nearly explicit in the decision's text—any credited evidence that would "support the inference" that an employee's union or other protected activities figured in the employer's motives for acting against the employee. However, even though a variety of forms of proof are capable of supporting the inference, the Board's precedents make it clear that certain facts or conditions must necessarily be shown to exist before the Board will infer that the employer's action was tainted by an unlawful motive. Thus, to take the most obvious example, it is axiomatic that the employer could not have been "motivated" by the employee's protected activity if the employer didn't know about any such activity. Accordingly, credible proof of "knowledge" is a necessary part of the General Counsel's threshold burden, and without it, the complaint cannot survive.¹

Although knowledge of protected activity is a necessary part of the General Counsel's prima facie showing, proof of such knowledge is not alone sufficient to carry the prosecution's burden. Rather, something more is required before an inference may be drawn that an employer's action against an employee was motivated by the employee's protected activity. The "something more" is proof of "animus," i.e., credited evidence showing not only that the employer knew of the protected activity, but viewed it with a hostile eye. Indeed, animus is another "requisite element" of the General Counsel's threshold burden under *Wright Line*, and, even where knowledge has been established, the failure to make a credited showing of animus will likewise warrant dismissal of the complaint. 19

Accordingly, in a case requiring a Wright Line analysis, before any burden will be said to have "shifted" to the employer, the trier-of-fact must first be satisfied that the credited record establishes, at a minimum, the existence of both knowledge and animus. And in this case, these requirements mean that the General Counsel must have credibly established that the Respondent, (a) knew or believed before taking each of the complained-of actions against Lopez and Rivera that they were engaged in organizing activities for the Union, and (b) that the Respondent was hostile to those activities. If the General Counsel satisfies the prosecution's burden of persuasion as to the motivating-factor element (with its key subelements of knowledge and animus), then—and only then—does Wright Line contemplate that the Respondent, to "escape liability," would have to "demonstrate" that it would have taken the same actions against Lopez and Rivera even absent their activities for the Union.

As I have noted, the Respondent's actors harmoniously testified that their first knowledge of the Union's campaign, and of Lopez' and Rivera's involvement in it, came when the Union's

initial charge arrived at the plant on May 26. Each of these witnesses testified about these and other material events in a straightforward way, and each told a coherent and plausible story. Clearly, to credit them as to their lack of earlier knowledge would doom the General Counsel's attacks on any actions allegedly taken against either Lopez or Rivera prior to May 26, and the only question remaining open for consideration would be whether Rivera's dismissal on June 5 was motivated by the Respondent's admitted, recently gained knowledge of his role in the Union's still-nascent campaign.

Virtually all of the evidence to the contrary—that the Respondent did have far earlier knowledge-comes from the mouths of Lopez and Rivera. Each of them testified, in substance, that he was repeatedly approached by Maintenance Foreman Vasquez—always separately, and always on the heels of one of the organizing meetings held in early March through May—and that in each case Vasquez would question him about the meeting of the preceding day. Moreover, according to Lopez and Rivera, a near ritual would repeat itself during each such episode: At the start of the work shift at 7 a.m., as the maintenance employees were gathering their tools in the maintenance shop, Vasquez would approach either Lopez or Rivera (always alone), ask how the "meeting" on the preceding day had gone, and follow-up with an inquiry about the numbers of employees in attendance, or whether the Union was getting good "support." Lopez or Rivera would invariably reply when so questioned that the meeting had gone just fine, and yes, the Union was getting lots of support. At least as important, virtually all the evidence offered to support the employer-animus element comes from the same testimony, which is also the basis for the "numerous interrogations" count in the complaint. However, Vasquez, in addition to claiming not to have known until May 26 of any organizing activities for the Union, flatly and specifically denied having had any such prior conversations with either Lopez or Rivera. Clearly, therefore, the resolution of this credibility dispute is not merely important, but pivotal, when it comes to making ultimate judgments about the merits of each of the counts in the complaint.

The General Counsel bore the burden of establishing the credibility of either Lopez or Rivera over that of Vasquez as to the existence of any such alleged "interrogations" about "meetings." If the factors favoring the credibility of either Lopez or Rivera as to any such alleged transaction are in equipoise with factors favoring Vasquez' denials of the same transactions, the alleged interrogations cannot be found to have occurred. Moreover, to the extent that the General Counsel's burden of showing knowledge or animus depends on a finding that the alleged interrogations actually occurred, a failure to credit Lopez and Rivera on this point would necessarily doom the balance of the General Counsel's claims. My ultimate assessment is that Vasquez was distinctly more credible in denying that he questioned either Lopez or Rivera about "meetings" than was either employee in claiming to the contrary. Indeed, on these key points of conflict, the testimonial claims of Lopez and Rivera struck me as not simply improbable in their own terms, but, in their manner of delivery, positively artificial.

My discrediting of Lopez and Rivera as to the supposed "numerous interrogations" by Vasquez amounts to a rejection

element by a "preponderance." 462 U.S. at 395, 398–399. And see *Manno Electric*, supra at fn. 12, reaffirming this understanding.

¹⁸ Stanford Linear Accelerator Center, 328 NLRB 464 fn. 1 (1999). ("Without this knowledge, there is no basis for finding that there was a prima facie case of discriminatory conduct.") See also, e.g., American Postal Workers (Postal Service), 278 NLRB 751, 752753 (1986).

¹⁹ See, e.g., Columbian Distribution Services, 320 NLRB 1068 at 1070–1071 (1996).

of the central evidence relied on by the General Counsel to demonstrate the early existence of company knowledge that the two workers were involved in activities for the Union.²⁰ Indeed, for reasons elaborated below, my credibility resolution leaves me with a record that fails to show company knowledge on any date earlier than May 26, when the Respondent admittedly learned, through receipt of the Union's charge, that Lopez and Rivera were somehow involved in activities on the Union's behalf

It is clear that the admitted evidence of knowledge by May 26 cannot sustain the General Counsel's burden with respect to counts attacking the pre-May 18 warnings to Lopez or his May 18 discharge. Nor will it aid the General Counsel in proving that the May 18 disciplining of Rivera was infected by knowledge of Rivera's activities for the Union. The same is necessarily true of counts in the complaint alleging that Vasquez "and/or" Waid, acting for unlawfully "retaliatory" reasons, engaged in "greater scrutiny of the work and/or work habits" of Lopez and Rivera prior to May 26. (Ditto for the claim that, on May 18, minutes before Lopez was fired, Vasquez "impliedly threatened" Lopez "in retaliation for his union activities.") Finally, although the Respondent's actors admittedly knew by May 26 that Rivera was somehow involved in activities for the Union, it remained in that case for the General Counsel to establish that the Respondent bore hostility to such activities. And my discrediting of Lopez and Rivera as to alleged "interrogations" by Vasquez requires me to judge that the "essential element" of animus remains unproved even in the latter case.

I will dismiss the independent 8(a)(1) count alleging "numerous interrogations" based simply on my judgment that Lopez and Rivera lacked credibility. Moreover, because I remain unpersuaded by the other circumstances invoked by the General Counsel as independently establishing either pre-May 26 knowledge or animus at any point in time, I will dismiss the 8(a)(3) counts and the remaining 8(a)(1) counts for want of a "prima facie" case, as *Wright Line* uses that expression. Accordingly, I will dismiss the consolidated complaint in its entirety. Finally, because the burden of "escap[ing] liability" for its admitted disciplining and discharging of Lopez and Rivera never shifted to the Respondent, I will not reach the question whether the Respondent made a showing that would satisfy suc a burden.

III. SUPPLEMENTAL FINDINGS AND DISCUSSION

A. Lopez' and Rivera's Prior Involvement in Unsuccessful Campaigns by the Teamsters in 1995 and 1996

1. Facts

On August 31, 1995, Teamsters Local 746 (the Teamsters) lost a Board election (Case 32–RC–4051) held among the Re-

spondent's production and maintenance employees at the Firebaugh plant during the peak of the season. Rivera was a participant in the preelection organizing campaign and served as an election observer for the Teamsters. After the election, the Teamsters filed objections and unfair labor practice charges (Cases 32–CA–14936 and 32–CA–14940). However, following 10 days of consolidated hearing in March–April 1996 before Administrative Law Judge James M. Kennedy, the parties settled these cases.

As part of the settlement agreement approved by Judge Kennedy, the Board conducted a rerun election on August 15, 1996, which the Teamsters again lost, receiving 256 votes while 329 ballots were cast against Teamsters representation. Rivera again participated in preelection organizing and served as a Teamsters observer in the rerun election. The Teamsters again filed objections and new unfair labor practice charges (Case 32–CA–15650). The Regional Director issued a new complaint pursuant to these charges and consolidated the objections case with the complaint case for purposes of hearing. A hearing was held in those cases in March–April 1997, this time before Administrative Law Judge Gerald A. Wacknov.

During the trial before Judge Wacknov, the General Counsel adduced testimony from seven employee-witnesses who were active Teamsters supporters during the prererun election campaign. They each testified that one or more agents of the Respondent (none of them plant-level supervisors or managers), made one or more coercive pre-election statements. Jose Lopez was one of these witnesses; he testified, in substance, that Operations Director Arnoldy had implied to him and a group of about five other mechanics that they could expect improved benefits if the Teamsters lost the election. Judge Wacknov issued a decision and order on June 5, 1997 (JD(SF)-53--97) dismissing the complaint in its entirety, recommending that the objections be overruled, and that the Board issue a certification of results. Judge Wacknov did not credit Lopez or any of the other pro-Teamsters employee witnesses as to critical features of their testimonial accounts. (Regarding Lopez' account, for example, Judge Wacknov found Arnoldy's counterversion more credible, and judged that "Lopez ... simply misunderstood what Arnoldy was attempting to convey." Id. at 12–13.) No party filed exceptions to Judge Wacknov's decision, and on July 17, 1997, the Board entered orders dismissing the complaint, overruling the objections, and certifying that the Teamsters had failed to receive a majority vote. 21

2. The significance, if any, of these facts

In the argument section of the prosecution brief (at pp. 14–16), counsel for the General Counsel devotes an extensive amount of attention to the subject of Lopez' and Rivera's involvement in the failed Teamsters campaigns of 1995 and 1996, placing particular emphasis on the Respondent's pre-

²⁰ The General Counsel invokes a variety of other circumstantial factors as independently pointing toward the existence of early company knowledge of the alleged discriminatees' activities for the Union. As I further discuss when I revisit these points below, none of the cited "independent" factors is persuasive evidence of such knowledge in tiself, and in attempting to make the whole of them greater than the sum of their parts, the General Counsel has been required to posit the existence of collateral scenarios that are themselves wholly speculative.

²¹ During this trial, counsel for the General Counsel represented that the General Counsel filed exceptions to Judge Wacknov's decision. The Board's July 17, 1997 Order and Certification of Results of Election states otherwise; it recites that "no statement of exceptions hav[e] been filed with the Board, and the time allowed for such filing h[as] expired[.]" Relying on the text of the Board's Order, I judge that the General Counsel's representation was mistaken.

sumed knowledge of their pro-Teamsters activities. Thus, the General Counsel states in a central passage: "[T]he law presumes that the existence of knowledge of past union support and activities continues into the future unless shown otherwise."22 And counsel adds, portentously, that "Respondent presented absolutely no evidence to indicate that its knowledge of Lopez' and Rivera's past union [i.e. Teamsters] support no longer existed." Oddly, though, the General Counsel does not specifically identify or explain how the (unremarkable) "presumption" in question (or the Respondent's failure to "rebut" it) might be significant to this case. In the absence of explication, I can only assume that the prosecution intends to implant the suggestion, without ever expressing it forthrightly, that the Respondent's disciplining and discharges of Lopez and Rivera in 1998 were motivated (somehow) by the Respondent's knowledge of the two mechanics' support for the Teamsters in 1995 and 1996. As I discuss next, I regard this suggestion as not just curious in terms of the General Counsel's overall purpose, but far-fetched in terms of its motivational likelihood, and overall, as simply a red herring.

For starters, the suggestion leaves me wondering what it may imply about the General Counsel's theory of prosecution. Is the General Counsel trying to argue, perhaps, that the "knowledge" element in this case is satisfied merely by invoking a presumption that the Respondent was aware of the pro-Teamsters roles played by Lopez and Rivera in 1995-1996? If so, such an argument would plainly exceed any claims made in the complaint, and would even amount to an attempt, sub silentio, to amend the complaint. For the complaint alleges simply that the Respondent took actions against Rivera and Lopez in 1998 because of their activities (in 1998) on behalf of "the Union" (which is defined in the complaint as the Graphic Communications Union), not because of their 1995 and 1996 activities on behalf of the Teamsters, a labor organization which is nowhere referred to in the complaint. Is the General Counsel perhaps claiming more modestly, instead, that if the Respondent knew early on about the Union's 1998 organizing campaign, its presumed knowledge that Lopez and Rivera had favored the Teamsters in 1995-1996 would have caused it to suspect that they would favor the Union in the 1998 campaign, as well? If so, then the General Counsel would still have to concede that the prosecution's burden of showing "knowledge" at least required proof that the Respondent was generally aware of the 1998 campaign by the Union before it took complained-of actions against Lopez and Rivera. And then one would have to wonder why the General Counsel would resort to such an attenuated argument when the very proof centrally relied on by the prosecution to show general knowledge of the 1998 campaign—the testimony of Lopez and Rivera about alleged "interrogations" by Vasquez in the months prior to their discharges—also would establish, if credited, that the Respondent was *specifically* aware of Lopez' and Rivera's 1998 activities on behalf of the Union. Thus, if Lopez and Rivera were credited as to the alleged "numerous interrogations," it would clearly be superfluous to emphasize a presumption that the Respondent was *also* aware of their 1995–1996 support for the Teamsters. And, if, as I have found, Lopez and Rivera were not believable in their claims about such prior interrogations, then it would not add a speck of weight to the prosecution case that the Respondent might be presumed to have been aware, at least, that they had supported the Teamsters in previous years.

In any event, I regard it as wholly unlikely on this record that the pro-Teamsters activities of Lopez and Rivera in 1995-1996 would have had any motivational connection to the Respondent's decisions to discipline and discharge them in 1998. For one thing, the record is utterly lacking in any evidence that the Respondent was hostile to those activities; therefore, the General Counsel's suggestion fails for want of proof of animus. Beyond that, so far as this record shows, the Teamsters had disappeared from the scene after losing the 1996 rerun election. Therefore, the Respondent's (presumed) knowledge that Lopez and Rivera were among the many workers who had supported the Teamsters (more than 250 workers had cast ballots for the Teamsters in the 1996 election) would not be likely to have influenced its treatment of them nearly 2 years later. Significantly, moreover, none of the other pro-Teamsters activists in the 1995 and 1996 campaigns are alleged to have been the victims of later unlawful discrimination at the Respondent's hands.

In sum, despite the General Counsel's implicit suggestions to the contrary, even if the Respondent might be presumed to have been aware that Lopez and Rivera had been Teamsters adherents in 1995 and 1996, this presumption would not genuinely help the prosecution meet its threshold burden in this case.

B. Rivera's and Lopez' Participation During the Early Months of the Union's Campaign

The Union's constituency consists mainly of workers in plants that manufacture corrugated boxes and other packaging materials. Sometime in February 1998, about 18 months after the Teamsters had lost the 1996 rerun election, the Union's representative, Jim Reza, learned from a union member at another plant that some mechanics at the Firebaugh plant were interested in making another try at getting union representation. Reza checked with his superiors in the Union, and got clearance to get in touch with these workers for purposes of starting an organizing drive. What follows are my findings regarding the timing and sequence of organizing events that occurred over the course of the next few months, and the roles played by Lopez, Rivera, and others in those events.²³

²² The General Counsel's formulation of what "the law presumes" is an adaptation of Administrative Law Judge Richard Linton's observation in *Lampi, L.L.C.*, 327 NLRB 222 (1998), that "[t]he law presumes that the existence of an established fact continues into the future unless shown otherwise." It's worth remembering, however, that where "knowledge" of something is concerned, the "presumption" under discussion is hardly the product of elevated or abstruse legal reasoning, but a simple expression of common sense: If you knew something once, I will presume that you still knew it later, unless you can persuade me that you forgot it in the meantime.

²³ I rely primarily on Union Agent Reza's systematic recollection of these matters of timing and sequence, partly supplemented by that of Pedro Flores, another mechanic involved in the Union's organizing drive from the start. Rivera's testimony about timing and sequence was roughly consistent with Reza's, but less distinct in some cases. Lopez showed more than a little confusion on these points, especially when he was haphazardly called upon by the General Counsel to integrate the

On Saturday, February 21, Reza met with four maintenance employees then working at the Firebaugh plant, Lopez, Rivera, Pedro Flores, and Lupe Baeza. The February 21 meeting began at a gas station in Firebaugh; however, because It was cold, the group soon retreated to Lopez' apartment, where they began to plan a new campaign.

On Thursday, March 5, Reza, joined by the Union's organizing director, Frank Martinez, conducted a second meeting with the original group of four employees, plus two additional mechanics from the plant, Salvador Flores and Juan Velasquez. This meeting took place in a restaurant in Firebaugh called the Pizza Factory. It started in the late afternoon. Reza invited the six workers to order pizza and beer, and they talked, ate, and drank at a table in the restaurant for more than an hour. Later in the meeting, some members of the group noticed the presence of Lucy Borboa, who was then in layoff status, but who, during the season, served as a supervisor over about 75 "sorting ladies" who worked the day shift. Borboa was also Rivera's nextdoor neighbor at the time, and she was familiar to at least one other mechanic in the prounion party, Pedro Flores. According to Rivera and Flores, Borboa made eye contact with one or more members of the group while waiting for a pizza order, but there were no words or other gestures of recognition between her and anyone in the prounion group. (Borboa, called to the witness stand by the General Counsel, but never examined by either party regarding her presence on March 5 in the Pizza Factory, testified on examination from the bench that she regularly patronized the Pizza Factory, and often encountered groups of other plant workers gathered there, but that she had no particular recollection of being there on or about March 5, or of having noticed the presence of the group in question on any of the many occasions when she admittedly patronized that restaurant. She also testified that she did not become aware that the Union was trying to organize at the plant until some point after the Union filed the petition for election on August 11, and that she first saw Reza's face only in December 1998, months after the Union's election victory.) For present purposes, I accept the testimony of Reza, Rivera and Flores that Borboa was, indeed, present in the Pizza Factory at one point during the Union gathering on March 5. However, for reasons I will amplify when I revisit the "knowledge" issue, I will reject as involving the rankest form of speculation at every level the General Counsel's attempts to have me find that Borboa, despite her denials, (a) took special notice of the group as she waited for her pizza order; (b) apprehended, somehow, that the group was assembled for a union-organizing purpose; (c) had a general "propensity" to inform her superiors about union organizing activities; and, therefore, (d) must have reported her (presumed) Pizza Factory observations and conclusions to higherlevel company officials soon after the event.

On April 2, Reza came to Rivera's home and met there with Rivera, Lopez, Pedro Flores, Lupe Baeza, and another employee whom Rivera identified as "Fernando Chicale or some-

meeting schedules into his accounts of the timing of the alleged interrogations by Vasquez. Accordingly, I give scant weight to any of his accounts about timing or sequence that may vary from Reza's testimony.

thing like that." In addition, on or about April 19, Reza conducted another meeting with the cadre members at Rivera's home, where the group gathered in Rivera's backyard patio.²⁴

The Union did not conduct another "public" gathering until Sunday, April 26, when it conducted a meeting at the VFW Hall in Firebaugh, attended by from 30–50 workers, including Rivera, Lopez, and others who had participated in prior meetings. Both Lopez and Rivera spoke up for the Union during the meeting. (Although the General Counsel focussed her inquiries on the activities of Lopez and Rivera at the meeting, I deem it reasonable to assume that other members of the original cadre likewise "spoke up.")

Between the March 5 sitdown at the Pizza Factory and the April 26 gathering at the VFW hall, Lopez, Rivera, and other cadre members had already gone to workers' homes in Firebaugh and nearby communities and had solicited many of them to sign authorization cards. During the April 2 meeting in Rivera's home, Reza had collected about 80 signed cards from him. (Between them, Lopez and Rivera claim to have secured about 140 authorization cards by early April. Assuming that these numbers were not exaggerated, or did not borrow on the efforts of others, they clearly suggest that many, if not most of Rivera's and Lopez' card-solicitation contacts by then were with seasonal workers still awaiting recall for the summer processing season.) Both Lopez and Rivera testified that they also engaged at uncertain points during these months in unspecified organizing activities in or near the plant. Even if credited, this testimony is too vague to permit a finding as to whether or not these activities "were conducted in such a manner, or at times that in the normal course of events the Respondent must have known about them."25

The last public meeting held by the Union prior to Lopez' discharge occurred on or about Thursday, May 7, in a park in Firebaugh. No more than 50 plant workers attended, including Lopez, Rivera, and, again, others in the initial cadre. Lopez and Rivera again spoke up in some manner.

Another such meeting was held on Thursday, May 21, three days after Lopez was fired, and the same day that the Union filed the initial charge herein, alleging that, "[w]ithin the past six months the employer has disciplined David Rivera and disciplined and discharged Jose Lopez in retaliation for their union activity." This latter meeting took place at a Catholic church in Mendota, a community near Firebaugh where many plant workers also lived, and was again attended by no more than 50 workers, including Lopez, Rivera, and others in the original group. Lopez and Rivera again spoke up.

C. The Alleged Interrogations

I have already recorded my ultimate judgment regarding Vasquez' alleged interrogations of Lopez and Rivera in the

²⁵ Hadley Mfg. Corp., 108 NLRB 1641, 1659 (1954).

²⁴ This is the list of April 2 attendees as reported by Rivera, who did not recall (as did Reza) that another meeting took place at his house on April 19. At p. 7 of her brief, counsel for the General Counsel has somewhat arbitrarily taken Rivera's list of attendees at the April 2 meeting as the list of attendees at the April 19 meeting. In fact, Reza's testimony about the April 19 meeting does not clearly indicate who was present on that occasion, other than Lopez and Rivera.

months before each was fired: I am not persuaded that any such questioning ever took place, not even once. I have already noted my ultimate reason for reaching this judgment: Vasquez was more convincing in denying that any such event ever occurred than was either Lopez or Rivera in claiming to the contrary. Considerations of witness demeanor are influential in these judgments. Admittedly, however, "demeanor" can be a rather ineffable and subjective consideration. (The same demeanoral cue that leads one judge to draw a positive or negative inference about the truthfulness of a witness could be quite uninfluential in another judge's assessment of the same witness.) Here, my negative assessment of the demeanoral credibility of Lopez and Rivera has hardly anything to do with any personal mannerisms or expressions or tics they might have displayed at any given moment in their testimony; rather, it has to do with their overall style and manner of testifying—the reflexively pat way they usually responded to important examinations, their common tendency to lapse into vague and generalized forms of description, even when called upon to answer specific questions about specific events or alleged events, and their frequent eagerness to interject their own private conclusions and speculations about the motivations underlying the behavior of various company actors.

Their stories also suffered from improbability. As I have noted, both Lopez and Rivera claim that Vasquez approached each of them separately on the heels of several (perhaps all) of the organizing meetings held in early March through May, and in each case would ask them in nearly identical terms how the "meeting" had gone, and whether it had been well-attended, following which Lopez or Rivera would invariably reply that the meeting had gone just fine, and lots of employees were backing the Union. The brief and virtually identical nature of each of the supposed exchanges alone makes me suspicious. If Vasquez had, indeed, learned (somehow) about each of the Union's meetings, and were, indeed, bent on gathering useful intelligence concerning them, it seems unlikely that his questioning-and Lopez' or Rivera's replies-would have taken on the near-ritual quality that both Lopez and Rivera have depicted. Moreover, when counsel for the General Counsel or anyone else asked either witness for details associated with a particular alleged instance of questioning by Vasquez, each invariably replied in terms of what Vasquez "would" generally do, strongly implying that each witness had no genuine memory of the particular incident sought to be developed. Indeed, when a witness claims generally that such events have repeatedly occurred, but shows, as did Lopez and Rivera, an utter inability to recall any of the inevitable nuances or variances in the particulars of any given exchange, this invites the interpretation that the witness has no genuine memory of any of the supposed exchanges, but is rotely adhering to a prearranged story while keeping it vague enough to avoid the chance of particularized contradiction.

A related set of additional considerations likewise causes me to regard Lopez' and Rivera's accounts as improbable: It is difficult to accept that Vasquez would have repeatedly questioned the alleged discriminatees about union meetings without ever having been overheard by any other mechanics present at the same time in the shop, or without Vasquez ever having questioned any of the other mechanics about the same matters. Thus, none of the other mechanics who were shown to have been among the Union's early supporters (a list that includes at least Pedro Flores, Salvador Flores, Lupe Baeza, Juan Velasquez, and Fernando "Chicale") claims to have been the target of any interrogations by Vasquez, even though Vasquez supervised all of them, and even though they, too, had attended many or all of the Union's meetings in the March through May period. Beyond that, I find it suspicious that Lopez and Rivera invariably testified that other mechanics present in the maintenance shop were always out of earshot whenever Vasquez would question either of them about Union meetings²⁶ (These others included employees Pedro Flores and Jose Luis Rosales, who were called by the General Counsel to testify about different matters, but were never asked whether they had been privy to any such alleged interrogations, much less whether they had themselves been the targets of interrogations.)

Suspicions like these were only exacerbated by the confusing, haphazard, and often quite leading and suggestive manner employed by counsel for the General Counsel to elicit testimony concerning the timing and details of the supposed interrogations. The examination of Lopez created a hodge-podge of versions, leaving it to anyone's guess when, according to Lopez, the first instance of such alleged questioning might have occurred. (Depending on which portion of his testimony you focus your examination, you could conclude that the first interrogation occurred in "March," after the March 5 Pizza Factory meeting, ²⁷ or (b) in "April," after either the April 19 meeting in Rivera's backyard patio, or the April 26 gathering at the VFW hall, or (c) perhaps in May, after the May 7 meeting in the Firebaugh park.) Moreover, in one version that was seemingly encouraged by counsel for the General Counsel even though she knew or should have known that it could not have been true in the light of her other evidence, Lopez was even heard to say that Vasquez questioned him at work on the day after the meeting at the Mendota church, a meeting which, as everyone agrees, occurred on May 21, 3 days after Lopez was fired.²⁴

²⁶ I find it suspiciously convenient that both Lopez and Rivera always claimed to have been questioned separately, and alone, by Vasquez. This, of course, eliminated any possibility that either of them might fail to corroborate the other, or, worse still, might contradict any version either might choose to adopt at any given moment during his examination. It also eliminated the possibility that other mechanics in the shop with less of a stake in the outcome of the case would fail to corroborate, or would contradict, either or both of them.

²⁷ On brief, the General Counsel appears to ignore any suggestions in Lopez' accounts that imply an interrogation by Vasquez in March, in the aftermath of the Pizza Factory meeting. Thus, at p. 8, she identifies the "very next day" after the April 26 meeting at the VFW hall as the first of the occasions on which Vasquez questioned Lopez or Rivera. Exactly why she has implicitly rejected Lopez' claims as to an earlier interrogation in March is left unstated. And her seeming abandonment of the claim is made independently curious by her elaborate attempts elsewhere to establish, nevertheless, that Borboa, based on her presence in the Pizza Factory on March 5, must have been the first source of the Respondent's knowledge of union organizing.

²⁸ On brief, the General Counsel ignores Lopez' clearly erroneous testimony about a supposed interrogation by Vasquez on the "day after" the Mendota church meeting, except to say (at p. 23) that Lopez was

Thus, although Lopez was certain that Vasquez had again questioned him after that meeting, he was certainly wrong, and his reckless insistence on the point led me to think, again, that he was simply trying to adhere, however clumsily, to a prearranged story, according to which *every* meeting was followed by an inquiry from Vasquez the first thing the next morning.

Rivera, too, was led by the General Counsel's questioning to state that Vasquez first questioned him the morning after the April 26 meeting at the VFW hall, and continued to question him on the morning after virtually every subsequent meeting prior to Rivera's June 5 dismissal. Absent such steering, I have no confidence that Rivera would have independently so recalled the timing and sequence. And considering the woodenly rote quality of his supposed recollections of the contents of each of the supposed interrogations, I again have no confidence that he was testifying from any genuine memory.

These suspicions lead me ultimately to the following questions: First: if Vasquez did have the kind of high-speed intelligence about Lopez' and Rivera's participation in the Union's meetings that is necessarily implied by their various claims, why would Vasquez bother to "interrogate" Lopez, Rivera (or

"confused about the dates of the union meetings in May." In fact, he was obviously "confused" not merely about the dates, but about the locations and sequences of meetings both in April and May. Moreover, it is evident that the General Counsel must have been confused herself about such things, for it was she who elicited Lopez' claim that on the day after the meeting at the Mendota church, he was again interrogated by Vasquez, even though he had been discharged on May 18, and admittedly did not appear again in the maintenance shop (where the interrogation allegedly occurred) after his discharge. Thus:

- Q. And where was that meeting?
- A. At the church hall in Mendota.
- Q. What time was it?
- A. Also in the afternoon.
- Q. How many—who was present there?
- A. There were a lot of people there also.
- Q. About how many?
- A. More than 30 people also.
- Q. You might have already said but, what city was the meeting in?
 - AIn Mendota.
 - Q. Did you speak at the meeting?
 - A. Yes
- Q. Do you remember having any conversations with anyone at work regarding the union, after that meeting?
 - A. Yes.
 - Q. When?
 - A. The next morning with John Vasquez.
 - Q. And where were you?
 - A. The same place, at the shop.
 - Q. What time was it?
 - A. Seven in the morning, 7:15.
 - Q. And what language was the conversation in?
 - A. In Spanish.
 - Q. What was said?
- A. The same questions, how many people had attended the meeting, whether the people w re cooperating with us, questions like that
 - Q. What did you say, if anything?
- A. I answered him that everything was going fine, that also many people had attended.

any of the other attendees) about the meetings? Alternatively, if Vasquez were seeking more particularized intelligence than his supposed source had provided, why, then, would he content himself with the kinds of generalized questioning and responses that Lopez and Rivera have described? Finally: Why would Vasquez single out only Lopez and Rivera for such questioning? (So, too, one might ask, more broadly: Why would Lopez and Rivera be the only ones targeted for "greater scrutiny of their work and/or work habits," or for disciplinary action, or for discharge?) The record made by the General Counsel does not provide any ready answers to any of these questions, at least none that would support the prosecution's case. Indeed, the only answer that plainly suggests itself in the circumstances is that Vasquez did no such thing, but Lopez and Rivera, being the only supporters of the Union who later suffered discipline and discharge, were required as part of any plausible challenge to these actions to fabricate a story that would supply the otherwise missing elements of knowledge and animus in their cases, moreover, a story according to which the other members of the pro-Union cadre of mechanics were unimportant figures, too inconspicuous to attract the Respondent's attention.²⁹

As I noted at the outset, the General Counsel bore the burden of establishing the credibility of either Lopez or Rivera over that of Vasquez as to the existence of any such alleged "interrogations" about "meetings." Considering all of the foregoing, I judge that the evidence falls woefully short of that mark. Accordingly, I reject any claims that assume the existence of the alleged interrogations by Vasquez, necessarily including claims that depend on the alleged interrogations as a basis for finding either knowledge or animus.

D. Claims of Knowledge Based on Other Factors

In this section I will address prosecution claims that the Respondent's early knowledge of the Union's campaign—and of Lopez' and Rivera's role in the campaign—can be independently inferred from other facts and circumstances. Before embarking on this subject, however, it's worth reiterating that even if these "independent" factors had greater evidentiary value than I think they do in satisfying the General Counsel's burden of demonstrating knowledge, they are still conspicuously lacking in indications that the Respondent was hostile to any union activities that it might have been aware of. Thus, the element of animus would remain unproved even if knowledge had been established, and this would alone justify dismissal of the complaint.

1. Borboa's presence in the Pizza Factory

As I discuss next, the unreasonably speculative character of the prosecution's reasoning is nowhere made more palpable than in the General Counsel's attempts to identify Borboa as the likely source of the Respondent's supposed early knowl-

²⁹ Although the prosecution's case focused on the activities of the alleged discriminatees and left largely undeveloped the activities of other members of the original prounion group, there is still no distinct basis in the record for supposing that Lopez and Rivera were any more "active" or "visible" on the Union's behalf in the early stages of the campaign than were the other mechanics who made up the Union's initial cadre.

edge of the Union's campaign and the alleged discriminatees' participation in it, all based merely on her presence in the Pizza Factory on March 5 while the union group was seated at a table in the same restaurant.

I will begin by reviewing and expanding on the setting as it was variously described by Reza, Rivera, and Pedro Flores.³⁰ The Pizza Factory is a popular restaurant in Firebaugh and is frequented by many plant employees and members of their families. The two representatives of the Union, Reza and Martinez, and the six mechanics in the group, were seated at a picnic-style table throughout the meeting, half facing towards the order counter, the other half facing away. (The order counter, according to Reza, was "20 or 30 feet away" from the table where the Union group was seated.) There were other patrons seated at other tables in the restaurant throughout the meeting. during which still others entered, picked up takeout orders, and left. Although union organizing was the purpose of the meeting, it could not have been the only subject of discussion, for the meeting lasted over an hour, and the witnesses gave only brief descriptions, if any, regarding the union-related subjects of conversation.31

The reported details of Borboa's presence and actions also deserve some amplification.³² Borboa arrived during the latter portion of the meeting. She was accompanied (as Reza specifically recalled) by a younger woman. The two women placed an order at the counter and then sat on a bench near the counter, chatting and waiting for the order to come up. (Reza couldn't make out what either woman was saying to the other.) At one or more points, Borboa looked in the direction of the group and made eve contact with one or more of them, including Pedro Flores, but no words or gestures of recognition were exchanged. (If I were to accept Rivera's unique recollection in this regard, I might find that she not only made eye contact with one or more of the mechanics, but "stared" at the group in general. However, this was not only a unique recollection, but a self-serving and improbable one given all the known circumstances, and I give it no weight.³³)

In her discussion on brief, counsel for the General Counsel finds these facts to be fraught with evidentiary significance, but her arguments depend in part on a distortion of them: Thus, in a factual recitation at page 7, marking her first foray into the subject, the General Counsel states blandly that "Borboa entered the Pizza Factory and observed the group . . . meeting with the Union." This "factual" claim obviously imparts an interpretive spin to the evidence—that Borboa not only observed the workers seated at a table, but "observed" that they were "meeting with the Union." However, the evidence is clearly too fragile to sustain this kind of spinning, for it remains entirely unclear how Borboa could have "observed" the *nature* of the gathering simply by "observing" the group of people seated at the table, who, by all accounts were merely eating pizza, drinking beer, and talking.

Counsel for the General Counsel also finds dark significance in the fact that neither Rivera nor Flores greeted Borboa, even though they both knew her and she knew them. Thus she states on brief (p. 16) that the "failure" of Rivera or Flores to greet Borboa "would have confirmed [sic] to Borboa that the employees were engaged in union activities." However, even if I were to ignore counsel's contextually inappropriate use of the verb confirmed,34 I would still have to regard her point as grounded in a singularly specious bit of reasoning—that the failure-to-greet would permit Borboa to draw only one conclusion from among the many obvious possibilities—that the nongreeters must be engaged in union activities, rather than merely being preoccupied with eating pizza, drinking beer, and talking.³⁵ Moreover, in laboring to ascribe more significance to the failure-to-greet than it ever deserved, the General Counsel unwittingly finds herself in the position of trying to straddle horses prancing in opposite directions. Thus, for these purposes, she also speculates that the failure of anyone at the table to greet Borboa would have been a sign to Borboa that they were "uncomfortable and concerned about her presence." But the General Counsel elsewhere sought to depict Lopez and Rivera as open and unapologetic adherents of the Union; indeed, she stresses (on the same page of her brief, but for the latter purpose) that "Lopez and Rivera did not make any attempt to keep their union activities a secret" (except, appar-

gathered over beer and pizza in a community restaurant, including some known to Borboa to be plant mechanics, be enough to arouse Borboa to "stare" at the group? Thus, I doubt that she stared. In addition, Reza claimed only that Borboa "looked" at the group several times, and Pedro Flores, who had known Borboa for about 20 years, did not claim that Borboa stared at the group, only that his eyes met hers at one point. Moreover, Flores also testified that Borboa was "doing her business and I was doing mine[,]" implying that the exchange of glances was casual and unremarkable, as was Borboa's presence and behavior in the restaurant in the first place.

³⁰ The General Counsel elicited Lopez' recollections about the Pizza Factory meeting, but he said nothing about Borboa's presence in the restaurant, one of several indications that Borboa's presence was far less remarkable than the prosecution would now have me find.

³¹ As Reza sketchily recalled it, they talked about what the Union might be able to do "to help ameliorate the situation that they thought was not so good at Tomatek," and Reza encouraged the workers to get enough authorization cards signed to permit the Union to file a petition. Because it couldn't take very long to say these things, I have to assume that the time spent by the group must also have been occupied with the kind of small-talk, shop gossip, jokes, and other manifestations of conviviality that usually attend any gathering of people with a common interest, especially when the gathering takes place in a public restaurant, over beer and pizza.

³² Although Borboa testified (quite plausibly, in my assessment) that she had no particular recollection of the event, she readily acknowledged that she was a regular patron of the Pizza Factory, and I don't think Reza, Rivera, and Pedro Flores were all lying when they placed her in the restaurant on March 5

³³ Rivera's admitted failure to greet or otherwise acknowledge Borboa strikes me as an unnatural reaction to being "stared" at by a next-door neighbor. Beyond that, why would a seated assembly of men

³⁴ Implicitly, the General Counsel asks us here to suppose, a priori, that Borboa would have instantly suspected, upon seeing the seated group, that they must be involved in a union organizing meeting, and thus that the failure-to-greet could only have "confirmed" these suspicions.

³⁵ Sometimes a specious line of reasoning is best exposed by turning it on its head: Borboa did not greet any members of the seated group, either; therefore, *they* were entitled to conclude that Borboa and her woman companion must be engaged in union activities.

ently, when cowed into silence by the presence of seasonal sorting supervisor Borboa at the pizza order counter.)

The General Counsel also argues on brief (p. 17) that Borboa had a "proven propensity" for informing her superiors about union activity. Both quoted words deserve a closer examination: Counsel's supposed proof of such a characterological propensity on Borboa's part is evidence that I rejected as remote and liable to lead to wasteful collateral litigation when it was first tendered. This was a written declaration (rejected GC Exh. 15) that Borboa had signed on September 11, 1995 (relating to the 1995 Teamsters election campaign, supra), in which she summarily described having told a presumed management agent named Tom Sewell about a report she had received from an employee about threats made by pro-Teamsters employees. On brief, the General Counsel has asked me to reconsider my rejection of Borboa's 1995 declaration and to receive it into evidence. I decline to do so, essentially for the same reasons I noted during the trial,³⁶ plus two additional ones: First, the proffered evidence is simply too isolated and remote to provide plausible support for the argument for which it is now offered—that Borboa's general character or personality was such as to predispose her to run to higher management with news of any union activities that might come to her attention. Second, even if the scant evidence in question would permit a finding that Borboa was generally thus predisposed, such a finding would deserve no ultimate weight in the absence of independent, credible evidence that Borboa was aware of union activity at relevant times in 1998. My findings above explain why I am unwilling to conclude that Borboa became aware of union activity simply by virtue of her presence in the Pizza Factory on March 5. There is no other evidence that could reliably establish such awareness on her part. Accordingly, the General Counsel's "propensity" claim, even if it had been "proved" (and it would have taken more than her September 1995 declaration to establish such proof) remains in the end a merely hollow one.

2. Waid's April 24 entry in his daily log

Waid kept a rather detailed handwritten log of his daily activities. The Respondent offered only a portion of that log into evidence, and the tendered portion alone included about 250

consecutive pages, covering the period March 6 (the day after the Pizza Factory meeting) through July 20. Each of the pages in the tendered portion is dense with notations reflecting various incidents that had come to Waid's attention, his to-do lists, inspection schedules, and other, seemingly typical indications of the concerns and responsibilities associated with a plant manager's job, especially one who is responsible for getting the plant ready for another processing season. The Respondent argues, and I agree, that the log tends to show, inter alia, that Waid's first knowledge of union activities came when Waid said it did, on May 26, when the Union's initial charge arrived at the plant. Thus, the first reference of any kind to any union-related subjects appears on page 164, reflecting a May 26 entry, in which Waid wrote: "Call Chris Thomas! Unfair Labor Practice? (Call Steve [Arnoldy] and Bill)."

However, there appears one other prior entry, made on Friday, April 24. This entry, near the top of page 96, states as follows: "Can we make promises-comparisons with Helms/San Benito[?]"³⁷ This notation appears immediately below a note that states: "Christian May 11." It also follows a note at the bottom of the preceding page dealing with a planned meeting to be conducted with the seasonal "lead people."

The General Counsel finds (Br., pp. 23-24) that this entry "speaks for itself," and that it "indicates . . . that by April 24 Respondent not only knew of the new organizing activities but was already devising plans to meet it." Again, I think that the General Counsel's conclusions are skewed unduly by speculation and wishful thinking. In my view, the entry is, at best, equivocal in its evidentiary significance. While labor lawyers might be quick to infer from an employer's references to "promises and comparisons" the background existence of a union organizing campaign, such an inference is hardly an inescapable one, for the terms are part of ordinary daily speech, and are used by employers (and other nonlawyers) in countless contexts where union organizing is entirely absent from the picture. Thus, Waid's April 24 entry, standing alone, is an alltoo-slender basis for finding that Waid was aware of the Union's campaign by April 24.

The evidentiary significance of the entry, frail to begin with, is diminished further by Waid's ultimate explanation for it, an explanation which I found both plausible and credibly-delivered, even if tentative and at times confusing. Thus, on examination from the bench, Waid showed what I regarded as a genuine attempt to search his memory to see if he could recall what the entry referred to. He first focused on the page 95 note concerning the planned meeting with seasonal lead people, and speculated, while confessing that he had no genuine memory, that the "promises-comparisons" entry might have been a note about something he planned to say to the lead people. However, when he later focused on the "Christian May 11" note, this triggered what appeared to me to be a genuine memory. Thus, he recalled, in stages, that this referred to the expected return date of Christian Garrido, an electrical engineer employed by

³⁶ In rejecting the General Counsel's initial tender of GC Exh. 15 on February 9, I noted first, as follows: "My judgment in any case is that her activities in connection with an earlier union campaign, to try to litigate those would open the door to a bunch of collateral litigation and it doesn't go directly to activities that concern us now." And I ruled that, "[T]he contents of the affidavit [the declaration], plus, and assuming arguendo that Mr. Sewell was then an agent of management in his capacity as personnel manager, I'm still finding that the fact you seek to prove is too remote and tangential to be worthy of admission in this case. I'm not saying it is utterly irrelevant, I am ruling that, and I believe it's Rule 403 [Federal Rules of Evidence] that it would be a waste of time to pursue it. So, I'm rejecting your offer of proof. You may, as you choose, make an exhibit for the rejected file."

Moreover, on February 11, when the General Counsel supplied the exhibit for the rejected file, I further noted as follows: "Simply, to add to remarks I made at the time, my judgment is that essentially what this would go to is impeachment of Ms. Borboa on what amounts to a collateral matter."

³⁷ Waid acknowledged that these were references to the Respondent's (already-unionized) plant in San Benito and to another plant (Helms) which the Respondent does not own. (Waid wasn't sure about the union or nonunion status of the Helms plant.)

the Respondent as a consultant on automation projects. In this regard, Waid further stated, "I remember talking to Christian about him coming back on May 11th, and those ["promisescomparisons"] are the two things I talked to him about." He then recalled, in substance, that the April 24 entry referred to a question in his mind whether he could "promise" Garrido a higher salary, and whether "comparisons" between the automation levels at the San Benito and Helms plants should be taken into account in the salary calculation. 38

3. Miscellany

Sprinkled throughout the General Counsel's brief are a variety of other arguments in support of the claim that the Respondent had early knowledge of Rivera's and Lopez' activities for the Union. In my view, these arguments commonly suffer, again, from speculation grounded in evidence that I regard as too shaky to provide any useful support for the speculation. Thus, in one example, the General Counsel hints at a "smallplant" theory of knowledge when she emphasizes (p. 19) that the two workers' organizing efforts occurred during a period when "there were only between 40 and 80 employees working ... in the plant where word travels fast." However, the smallplant rationale is, (a) one that the Board does not appear ever to have relied on solely as its basis for finding employer knowledge; (b) appears to be a disfavored one in the cases that have addressed it; and (c) seems best applied, if at all, only to inplant organizing activities.³⁹ And clearly, the application of such a theory in this case, involving organizing in a unit of more than 500 workers, done mostly away from the plant, would be especially problematic.

The General Counsel also argues (p. 25) that "[f]urther proof of Respondent's knowledge (or its suspicion) that Lopez and Rivera were involved in union activity may be found in Respondent's undisputed bathroom surveillance of them." Here, what the General Counsel so glibly refers to as the "undisputed bathroom surveillance" is grounded solely in Lopez' and Rivera's vague and fragmentary testimony concerning incidents in which, while they were in a toilet stall, they observed (through the crack formed by the hinge joint of the door) that certain supervisors would also enter and leave the bathroom, without performing any of the normal functions associated with such visits. I found their testimony in this regard to be not merely vague as to timing and other particulars, but especially

self-serving and unreliable. It's hard to believe in the first instance that their limited views through the stall door crack would have allowed them to observe as much as they claimed to have seen from that vantage. Moreover, their descriptions of the supervisors' actions were peppered with gratuitous and self-serving statements amounting to conclusions about the supervisors' motives for their presence. More important in my view was their acknowledgment that plant supervisors have always used this same bathroom. Accordingly, I find this evidence to be quite unreliable as proof of the requisite element of knowledge.⁴⁰

The General Counsel also cites (at p. 19) the Respondent's supposedly "unconvincing reasons" for terminating Lopez and Rivera as affirmative evidence supporting the "inference that Respondent acquired early knowledge of their renewed organizational activity in 1998." One of the most obvious difficulties with such claims is that, under Wright Line's analytical scheme, an employer is under no obligation to advance "convincing" lawful reasons for acting against an employee in order to avoid a finding that its motives were tainted by unlawfully discriminatory reasons. Rather, it is the General Counsel's burden to establish the latter, and that burden is not carried merely by casting doubt on the reasons advanced by the employer. Indeed, the General Counsel has failed to identify any case—and I have located none in independent research—in which the Board has relied merely on the "unconvincing" character of the employer's professed reasons for acting against an employee to supply the otherwise missing proof of "knowledge" (or of "animus"). Instead, my research indicates that where the Board has invoked disparity of treatment as a factor pointing in the direction of knowledge, it is has also relied on other, more persuasive indicators of knowledge. 41 I note further in this regard

³⁸ The General Counsel's attacks on this explanation (Br. pp. 24–25) are manifold, ranging from the charge that "Waid changed his testimony midstream," to invocations of findings made by Judge Wacknov in his decision, supra, in the case growing out of the Teamsters second election loss in 1996. The charge that Waid "changed his story" does not accurately capture the nature of the evolution of Waid's testimony. The other attacks, including those which are grounded in findings made by Judge Wacknov, are too remote or peripheral to seriously undermine the credibility of Waid's explanation. They also seem to rely on *non* sequiturs. For example, the General Counsel states: "Waid made no explanation as to why he, the plant manager and top executive for the Respondent [sic], would ponder whether he could offer Garrido a wage increase." (Are we to assume that such "ponderings" are not the predictable stuff of a plant manager's life? If so, why?)

³⁹ See discussion and authorities cited in *Basin Frozen Foods*, 307 NLRB 1406, 1408–1409 (1992).

⁴⁰ I reach virtually identical conclusions about the "greater scrutiny" allegedly imposed by Waid "and/or" Vasquez on Lopez' and Rivera's "work and/or work habits." The General Counsel again relies primarily on Lopez' and Rivera's vague, self-serving, and conclusionary accounts as evidence of such "greater scrutiny." Moreover, there is no evidence of record (other than in Lopez' and Rivera's conclusionary claims) that independently establishes what the "normal" level of supervisory "scrutiny" might be at the plant. Finally, counsel for the General Counsel substantially overstates the evidence when she argues (p. 26): "In fact, Respondent admits that, prior to their respective discharges, it was monitoring Lopez and Rivera more closely." In fact, neither Waid nor Vasquez admitted any such thing, and the only evidence of this cited by the General Counsel is Waid's testimony in which he talks about having observed Lopez and/or Rivera engaging in time-wasting or related misconduct on various occasions. And Waid's testimony on these points, far from constituting an admission that he was imposing 'greater scrutiny" on these workers, indicates that in each case, his notice of these things occurred incidental to his work activities of the moment

⁴¹ See, e.g., *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046, 1048–1049 (1985). There, the Board invoked a rather large number of other factors as "enhanc[ing] the reasonableness of inferring the Respondent's knowledge": The small and intimate "working environment" shared both by the dentists who had sought unionization and their dentist-managers; the fact that the discharged dentist had "solicited... dentists known to be opposed to unionization and on close terms with the managing doctors"; the demonstrated existence of a "rumor mill" within the dental clinic; management's "reliance on feed-

that while the Board has sometimes relied on disparity of treatment as the sole basis for inferring animus where "knowledge" is otherwise evident, it is because the disparity in question was so "blatant" as to admit of no other interpretation than that the employer bore animus against the protected activity. Here, I can find in none of the evidence cited by the General Counsel any convincing indications of any such blatant disparity.

Indeed, the wide variety of facts or supposed facts marshaled by the General Counsel do not even persuade me that the Respondent treated Lopez or Rivera "disparately" from other employees believed to be guilty of the kinds of offenses it believed Lopez and Rivera were guilty of committing. The flaws in many of these claims are too obvious to require comment. (For example, the General Counsel finds disparate treatment, and even "pretext," in the fact that Waid issued a warning to Lopez on May 1 for talking to Arcelia Posas at her work station, but failed to issue such a warning to Posas.) Indeed, the claims of pretext are grossly overstated, and remain wholly unsupported by the variety of anecdotal facts and speculations which underlie the General Counsel's claims. Put another way, the Respondent's professed reasons for acting against these employees, as carefully and plausibly detailed by Waid, were not shown to

back" from its employees when it came to "evaluating personnel matters." The Board also found it "significant" that the employer admittedly learned of the union drive from a dentist opposed to unionization. Also significant was the Board's agreement with the judge that the employer's claim that it only learned of the union drive from the antunion dentist after it had already fired the prounion dentist was "contrived and not worthy of crediting." (Indeed, this credibility judgment alone might have warranted a finding of predischarge knowledge.)

⁴² See, e.g., Fluor Daniel, Inc., 304 NLRB 970, 971 (1991); New Otani Hotel & Garden, 325 NLRB 928 fn. 1 (1998).

have been plainly false or merely fanciful. 43 The General Counsel's claims to the contrary are largely based on facts that can be found in a summary (Jt. Exh. 2, prepared by the Respondent in anticipation of this litigation) of disciplinary actions taken against employees in the 3-year period January 1, 1996. through January 14, 1999. And the General Counsel relies most heavily on evidence of discipline imposed during the remote end of that period, prior to Waid's arrival as plant manager. In my view, even this evidence of supposed disparity is again equivocal, at best, and raises only isolated and marginal questions about the even-handedness of the Respondent's application of its disciplinary policies over the course of several years. In addition, the comparisons in disciplinary treatment cited by the prosecution suffer from an apples-and-oranges problem; that is, none of the several disciplinary examples marshaled by the General Counsel to show alleged disparities involved cases that were substantially similar to those presented by Lopez and Rivera.

In sum, despite the General Counsel's efforts, I cannot find in the record as a whole any evidence that would reliably establish that the Respondent either had early knowledge (i.e., pre-May 26 knowledge) of Lopez' or Rivera's union activities, or even that, having gained such knowledge on May 26, it was hostile to such activities. Accordingly, I am compelled to judge that the General Counsel has failed to carry its threshold burden under *Wright Line*, and that the inquiry properly ends with that judgment.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁴

ORDER

The complaint is dismissed in its entirety.

⁴³ I emphasize here that this discussion does not purport to reach the question whether the Respondent's evidence as to its "reasons" for acting against Lopez and Rivera would be enough to carry its own *Wright Line* burden, in the hypothetical event that the burden had shifted to it. Rather, my focus here is on the question whether the reasons advanced by the Respondent were so plainly false or pretextual as to invite the *Shattuck Denn[*]* inference that they were invoked to conceal an ulterior and unlawful reason for the actions. And for reasons further noted below, I judge that the evidence could not support such an inference. (*Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466. 470 (9th Cir. 1966).)

⁴⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.